No. 18-642

# In the Supreme Court of the United States

MORRIS E. ZUKERMAN,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## ARGUMENT

This petition seeks review of two "core" features of the Second Circuit's procedure in reviewing criminal sentences, which "inevitably result[] in the approval of extraordinary sentences that would not be affirmed in any other court." Nat'l Ass'n of Criminal Defense Lawyers Br. 3 (NACDL Br.). Both practices are "glaring" outliers (*id.* at 2); both are obviously at odds with the sentencing statutes and this Court's precedent; and in this case, both resulted in the Second Circuit's affirmance of a freakishly harsh sentence. Both issues cry out for this Court's review. And, ultimately, the Government's attempt to evade such review through flawed waiver arguments and strained excuses for the Second Circuit's aberrant practices just underscores the need for this Court's intervention. The petition should be granted.

### A. The First Question Merits Review

The first question concerns the Second Circuit's one-of-a-kind "*Jacobson* remand" procedure. As NACDL has explained, that procedure flouts the sentencing statutes and is entirely "'out of step with the practice of other Circuits.'" NACDL Br. 4 (quoting *Rosales-Mireles v. United States,* 138 S. Ct. 1897, 1906 (2018)). The Government's attempt (at 13-17) to defend this practice is wholly unconvincing.

1. The Government does not dispute that the "*Jacobson* remand" procedure is an entrenched feature of sentencing appeals in the Second Circuit. *See* NACDL Br. 7-14. Under *Jacobson*, when the court of appeals finds a sentence deficient, it sends the case back to the district court—without vacating the sentence—for the "limited purpose" of supplementing the record. Pet. App. 3a; *see id.* at 22a. Unlike the

typical remand, in a *Jacobson* remand the district court cannot reconsider the underlying sentence and the Second Circuit retains jurisdiction over the appeal during the remand. NACDL Br. 5.

Nor does the Government dispute that Section 3742 requires that a case "shall" be remanded for "resentenc[ing]" whenever a sentence is "imposed in violation of law" (18 U.S.C. § 3742(f)(1), (g)), or that "failing to adequately explain the chosen sentence" (*Gall v. United States,* 552 U.S. 38, 51 (2007)) is "a violation of law" under Section 3742. Pet. 20; *see also United States v. Todd,* 515 F.3d 1128, 1139 (10th Cir. 2008) (Gorsuch, J.) (sentencing error requires resentencing under Section 3742(f)(1)).

Instead, the Government argues that Section 3742 was not triggered *here* because the Second Circuit never found that Zukerman's sentence "was imposed in violation of law." BIO 14-15 (quoting Section 3742(f)(1)). That is nonsense.

Zukerman argued that his sentence was unlawful because it lacked the adequate explanation required by *Gall*. *See* Pet'r C.A. Br. 52-55. In its remand order, the Second Circuit agreed with Zukerman that (1) it could "only defer to a sentencing judge's justifications 'if adequately explained,'" and (2) the record left it "unclear as to why and how [the district court] settled on $10 million as the fine." Pet. App. 22a. But instead of vacating, the court remanded for the district court to "elaborate on its rationale." *Id.*

That remand necessarily embodied the Second Circuit's determination that the sentence was *not* "adequately explain[ed]" under *Gall*. Indeed, the Second Circuit acknowledged *three* different ways in which the district court's explanation was deficient—

it failed to indicate (1) why the $10 million fine was "sufficient, but not greater than necessary"; (2) whether and how the district court considered the disparity between Zukerman's sentence and those for like offenders; and (3) what weight it gave to various factors. *Id.* (quoting 18 U.S.C. § 3553(a)).

To state the obvious, there was no reason for the Second Circuit to order *more* explanation if the *existing* explanation was adequate. The only sensible way to understand the court's decision is to take it at face value: The court concluded that the district court's cursory explanation was "unclear" (*id.*)—which is to say, *in*adequate—and thus incapable of justifying the fine, just as Zukerman had argued.

As *Gall* makes clear, the failure to "adequately explain" a sentence, especially an "unusually harsh" sentence like the one at issue here, is a "significant procedural error" that itself renders the sentence *in violation of law*. 552 U.S. at 46, 51; *see* Pet. 20. And the Government does not deny that an illegal sentence must be *vacated* and the case remanded for *resentencing*. 18 U.S.C. § 3742(f)(1), (g). Both the *Jacobson* remand procedure generally, and the Government's nonsensical attempt to deny the procedural error here, are flagrant attempts to circumvent this statutory command.

2. The *Jacobson* remand not only contravenes Congress's express command in Section 3742, but is grossly prejudicial to defendants. The Government does not deny that when inadequately explained sentences are vacated, district courts often impose more moderate sentences on remand. *See* Pet. 24; NACDL Br. 22. Yet, in the *Jacobson* remand, the original sentence is locked in place and the only role of the district court is to patch it up after the fact.

NACDL Br. 5. Indeed, as this case highlights, the *Jacobson* remand invites courts to invent *post hoc* justifications and introduces new errors into the sentence that the *resentencing* regime mandated by Congress avoids. *Infra* at 10-11; Pet. 23-28.

The *Jacobson* remand also erases another statutory requirement: that the "reasons for [the] imposition of the particular sentence" be stated "at the time of sentencing" and "in open court." 18 U.S.C. § 3553(c); Pet. 20-22. The Second Circuit based its affirmance of Zukerman's sentence almost entirely on reasons offered long after sentencing, in an opinion given outside of the presence of the defendant. This is exactly the opposite of the procedure Congress designed to promote fairness, public trust, and due process. The Government just ignores this pernicious feature of the *Jacobson* remand.

3. Unsurprisingly, when it comes to *Jacobson* remands, "the Second Circuit is a glaring outlier." NACDL Br. 2. The Government does not dispute that, in other circuits, an inadequate explanation triggers vacatur and resentencing, as required by Section 3742. *See* Pet. 22-23 (collecting cases). Instead, it just quibbles (at 15) that none of these circuits has explicitly "criticize[d]" *Jacobson*. But that hardly diminishes the disparity in sentencing treatment from one circuit to another—the thing that matters.

The Government's attempt (at 16-17) to conjure up something approaching the aberrant *Jacobson* remand procedure in other circuits fails:

- In *United States v. Dee*, 197 F. App'x 590 (9th Cir. 2006), the court of appeals *did* vacate the

defendant's sentence—precisely the disposition Zukerman argues for here. *See id.* at 592.[1]

- In *United States v. Lucena-Rivera*, 750 F.3d 43, 53, 56 (1st Cir. 2014), and *United States v. Andrade-Castillo*, 585 F. App'x 346, 347 (9th Cir. 2014), the courts of appeals explicitly gave the district courts discretion to resentence if they deemed it appropriate, rather than locking the lower courts into a fixed sentence, as the Second Circuit did here.
- In *United States v. Redmond*, 667 F.3d 863, 876 (7th Cir. 2012), and *United States v. Paladino*, 401 F.3d 471, 483-84 (7th Cir. 2005), the court of appeals remanded to allow the district courts to indicate whether, and how, they would have exercised their discretion to sentence outside the Guidelines—*not* to fix a deficiency in the court's original sentence, as here.
- And *United States v. Martinez-Saavedra*, 707 F. App'x 220, 223 (5th Cir. 2017), did not even implicate Section 3742, because it involved an appeal of the denial of a sentence-reduction motion, rather than the sentence itself.

The fact that the Second Circuit is such a blatant outlier on this recurring issue alone warrants review.

4. All that remains is the Government's assertion (at 13) of waiver. But ultimately, this argument is as baseless as its defense of the decision itself.

In his briefs to the Second Circuit, Zukerman expressly—and repeatedly—argued that the court of

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[1] Likewise, Chief Judge Wood's proposed mandate in *United States v. Reed*, 859 F.3d 468 (7th Cir. 2017), was to "reverse and remand *for resentencing*." *Id.* at 474 (emphasis added).

appeals should *vacate* his sentence and remand for *resentencing*. Pet'r C.A. Br. 3, 23, 25-26, 51, 58-60; Pet'r C.A. Reply Br. 24, 29. That was plainly enough to preserve his challenge in this Court, which asserts that the Second Circuit erred by *failing* to vacate and remand for resentencing. Pet. 19-28.

In response, the Government did not request (or suggest) a *Jacobson* remand—which, notably, it *has* done in other cases. *See, e.g.*, U.S. Br. 20-23, *United States v. Nurse*, No. 05-4976 (2d Cir. Apr. 26, 2006), 2006 WL 4452883. Nor did the Second Circuit itself raise the possibility of a *Jacobson* remand at oral argument. Instead, the court *sua sponte* invoked the *Jacobson* remand after argument without notice, taking the parties by surprise.

At that point, Zukerman could have sought certiorari challenging the Second Circuit's *sua sponte Jacobson* remand, just as he has done here. But he was also entitled to await a final decision before petitioning this Court for review of that interlocutory ruling. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 84 (10th ed. 2013); *see Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001). Indeed, the Court's preferred practice is to *wait* for a final judgment because further proceedings may obviate, or underscore, the need for review. Because Zukerman plainly could have petitioned for certiorari on this issue then, he plainly may do so now.

The Government's suggestion (at 13) that Zukerman should have "request[ed] a new sentencing" in the *district court* is bizarre. The remand was explicitly "limited" to "elaborating on the rationale for the fine imposed," Pet. App. 3a; the district court had no authority to contravene this command, *see Briggs v. Pennsylvania R.R. Co.*, 334

U.S. 304, 306 (1948). Nor was Zukerman required to challenge or seek reconsideration of the *Jacobson* remand order when the Second Circuit reinstated the appeal months later. Zukerman had *already* asked that court for vacatur in his original briefing, and he did not retroactively waive that request by failing to seek reconsideration after the ruling.

In any event, Zukerman expressly argued in his letter brief following the *Jacobson* remand that the district court's Supplemental Memorandum was procedurally improper because the new reasons added by the court had not been given "'in open court' and 'at the time of sentencing,'" C.A. ECF No. 157 at 1 (quoting 18 U.S.C. § 3553(c)), and the Second Circuit denied his request for full briefing. That, in itself, is sufficient to preserve the argument.

**B. The Second Question Merits Review**

As NACDL has explained, the Second Circuit's continued use of a shocks-the-conscience test for judging the substantive reasonableness of sentences is just as "profoundly anomalous" and "dramatic[ally]" wrong as its aberrational *Jacobson* remands. NACDL Br. 15-20; *see* Pet. 29-37. This unjust practice also warrants review.

1. The Government does not even attempt to deny that a shocks-the-conscience test is fundamentally at odds with this Court's precedents—and the decisions of other circuits—as Zukerman (at 29-31) and NACDL (at 18-20) explained. Instead, the Government argues (at 18-20) that the Second Circuit does not actually apply that test, and instead just applies the ordinary abuse-of-discretion standard.

That is fanciful—and the Government knows it. At oral argument in the Second Circuit, Government counsel concluded his presentation as follows:

> *The standard that this court must apply in this case is whether the sentence shocks the conscience*. . . . I respectfully submit that this sentence does not even stir the conscience, much less shock it. *For that reason*, the court should affirm.

C.A. Oral Argument at 22:26 (Jan. 17, 2018) (emphasis added). The Government's attempt to argue otherwise here—without even acknowledging its blatant about face on the issue—is remarkable.

The truth is that, when it comes to defending sentences in the Second Circuit, the Government routinely treats the shocks-the-conscience test as the relevant standard, not just loose words. *See, e.g.*, U.S. Br. 27, 29, *United States v. Brown*, No. 18-434 (2d Cir. Dec. 14, 2018), ECF No. 41; U.S. Br. 33-34, 39, *United States v. Schlisser*, No. 18-72 (2d Cir. Oct. 23, 2018), ECF No. 50; U.S. Br. 37, *United States v. Asch*, No. 18-395 (2d Cir. Sept. 17, 2018), ECF No. 41; U.S. Br. 29, *United States v. Jaramillo*, No. 17-3133 (2d Cir. July 20, 2018), ECF No. 46. And the Second Circuit listens. It has "routinely rejected substantive reasonableness challenges on the ground that the sentences imposed did not shock the conscience." NACDL Br. 17-18 & n.8 (citing nine examples).

The fact that the Second Circuit also refers to *Gall*'s abuse-of-discretion standard is irrelevant. *See* BIO 19. That court applies the shocks-the-conscience test in determining what *counts* as an abuse of discretion. *See, e.g., United States v. Rigas*, 583 F.3d 108, 122-24 (2d Cir. 2009) (asserting that

"substantive unreasonableness" and "shocks-the-conscience" tests "seek to capture the same idea," and explaining that sentence was not an abuse of discretion because it did not "shock the conscience" or amount to "manifest injustice").

The Government's attempt to argue otherwise just repeats the failed approach it took in *Rosales-Mireles*, *supra*. There, the Fifth Circuit *said* it was applying this Court's plain-error standard, but nevertheless used shocks-the-conscience language in the fourth prong of that standard. *See* 138 S. Ct. at 1905-06. And in defending the Fifth Circuit, the Government made essentially the same argument that it does here: that the shocks-the-conscience language was just surplusage, and did not actually alter the plain-error review. This Court rejected that transparent spin in *Rosales-Mireles*, and it fails here too.[2]

2. The Government's suggestion of waiver (at 17-18) is once again just a meritless diversionary tactic. To be sure, Zukerman acknowledged that the Second Circuit's decision in *Rigas* treated the substantive reasonableness question as whether a sentence was "shocking"—but he did not say that *Rigas* had *properly* interpreted *Gall*'s standard. On the contrary, he immediately noted that the shocks-the-conscience standard should *not* be used in the sentencing context. Pet'r C.A. Br. 29 n.4. That is precisely the same argument he makes now.

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[2] The Government notes (at 20) that here the Second Circuit addressed whether Zukerman's sentence was "shockingly high," but that is just a shorthand reference to that court's settled shocks-the-conscience test. *See, e.g., Rigas*, 583 F.3d at 123.

### C. This Case Underscores The Crucial Importance Of Both Questions

The importance of these issues is underscored by the Second Circuit's affirmance of the freakishly severe sentence at issue here.

1. Zukerman's $10 million fine is wildly out of step with all others imposed on tax offenders since the Sentencing Commission began keeping statistics. *See* Pet. 9-12. The Government tries (at 20) to shift the focus to the *statutory* maximum, but that is a red herring: The Government has not pointed to a *single* tax offender who has ever received a fine anywhere near the statutory maximum, and (no matter the statutory maximum) the district court's obligation is to explain any deviation from the *Sentencing Guidelines*. *Gall*, 552 U.S. at 49-50 & n.6; *see* 18 U.S.C. § 3553(c)(2). Here, the Guidelines range is $25,000 to $250,000; Zukerman's fine is *40* times the Guidelines max. Pet. 10 (chart). The Government just ignores that deviation entirely.[3]

Instead, the Government suggests (at 2-5, 21) that Zukerman deserved this extreme punishment largely because of uncharged conduct to which he never pleaded guilty—and that he would have challenged if the district court had relied on it at sentencing—as well as the fact that he was a "wealthy man" (*id.* at 21), which hardly sets him apart from all prior tax offenders. But in any event, defendants who committed far worse tax offenses, including those

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[3] The Government (at 21) points to Application Note 4 to U.S.S.G. § 5E1.2. But that Note applies to *departures*, not variances, and the district court found no "grounds warranting a departure." Pet. App. 49a; *see also* Pet'r C.A. Reply Br. 27.

involving far greater tax losses, received far lower fines. Pet'r C.A. Reply Br. 6-12.

2. The Second Circuit itself recognized that the district court's attempt to explain that shocking disparity at sentencing was inadequate. So the court invoked its *Jacobson* remand procedure—which prejudiced Zukerman in many ways:

- It denied him the resentencing to which he was entitled under § 3742(f), which often results in a lower sentence. *Supra* at 3.
- It introduced patently *post hoc* rationales for the sentence, including reliance on a website that *did not exist* at sentencing. Pet. 25.
- It denied him an opportunity to contemporaneously object to these new reasons in "open court" and correct them, as required by Section 3553(c).
- And worst of all, it introduced a crucial error on which the district court and Second Circuit relied to justify his sentence *post hoc*.

The latter point is especially prejudicial. The district court claimed in its Supplemental Memorandum (for the first time) that "$7.5 million in unaccounted losses," plus interest, justified the $10 million fine. Pet. App. 40a-41a. Yet, as the Government now admits (at 9 n.2), that premise—the district court's only real attempt to explain how it arrived at the $10 million figure—was *wrong*. By the time of sentencing, Zukerman had already repaid essentially all the taxes owed. The district court just invented millions of losses that did not exist—and the Second Circuit relied on that error. *See* Pet. App. 12a.

3. Zukerman was also prejudiced by the Second Circuit's application of the shocks-the-conscience test.

The Government's assertion (at 20) that applying the correct standard "would not affect the outcome" ignores what an incredibly harsh and aberrational sentence this was. The only premise that could possibly justify a $10 million fine was the district court's belief that Zukerman had gotten away with more than $7.5 million in wrongful gains. But again, the Government itself now admits that premise is false. Accordingly, Zukerman's sentence could not survive review under the reasonableness standard that would have applied in any other circuit.

The highly aberrational, blatantly wrong, and grossly prejudicial practices at issue in this case should not be allowed to persist any longer.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 5, 2019